DEPARTMENT OF THE NAVY

IBLA 87-159 Decided May 2, 1989

Appeal from a decision of the Ridgecrest Resource Area Office, Bureau of Land Management, approving amended mining plan of operations. CA MC 122901 and CA MC 122902.

Affirmed.

1. Mining Claims: Plan of Operations

Approval of a mining plan of operations will be affirmed where the record indicates that BLM examined and carefully considered the plan of operations, reviewed environmental impacts and properly conditioned approval of the plan on the performance of measures to mitigate or prevent any environmental degradation.

2. Mining Claims: Plan of Operations--Rules of Practice: Protests

The mere assertion that mining claims were located while the land was closed to mineral entry, unsupported by probative evidence of that fact, provides an insufficient basis for the rejection of a mining plan of operations filed with respect to such claims.

APPEARANCES: P.J. Valovich, Department of the Navy, Naval Weapons Center, China Lake, California, for appellant; Bryant A. Ross, Inyokern, California, for respondents.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Department of the Navy has appealed from a decision of the Ridgecrest Resource Area Office, Bureau of Land Management (BLM), dated October 3, 1986, approving an amended mining plan of operation for two association placer mining claims, the Lyra-Vega Nos. 124 and 125 (CA MC 122901 and CA MC 122902), located in W\ sec. 9, T. 28 S., R. 43 W., Mount Diablo Meridian, California. We affirm.

The claims in question are situated in Christmas Canyon in an area withdrawn for proposed inclusion in the China Lake Naval Weapons Center

(NWC) as a security and buffer zone for the Randsburg Wash Test Range. See 49 FR 2550 (Jan. 20, 1984). 1/ This area is referred to as the Sea Site withdrawal. The notices of location for these claims are dated March 7, 1983, when the land was open to mineral location.

Alcola Western Corporation, through Bryant A. Ross, filed an initial mining plan of operations on May 30, 1986. The plan proposed to excavate six 20- by 20-foot pits, insert waterproof liners and backfill them with ore. Under the original plan as submitted, thiourea and alkali leaching solutions would be applied to the ore and the resultant leachate would be siphoned from the bottom of the pits.

By letter dated July 30, 1986, Ross notified BLM that he would proceed with the plan in his own name and further informed BLM that, owing to difficulties encountered in obtaining the necessary permits from the Lahontan Regional Office of the California Regional Water Quality Control Board (RWQCB), he wished to amend the plan to exclude heap leaching and include dry washing operations. On August 11, 1986, BLM notified Ross that it needed additional information identifying the location of the proposed operations on the ground.

By letter dated July 10, 1986, BLM had informed NWC of Ross' initial mining plan of operations and solicited comments on his proposal. On August 15, 1986, NWC responded, noting a variety of problems which it had as to the proposal. Specifically, NWC expressed concern as to the possibility of groundwater contamination, particularly of Navy wells down the canyon from the proposed operation. NWC also contended that the claims were not posted on the ground prior to the segregation of the land from mineral entry and asserted that the claims were clearly spurious.

On September 5, 1986, Ross filed additional information and maps to update the plan of operations. As amended by this last filing, the proposal envisioned the use of sodium hypochlorite for leaching the ore. Two 30- by 50-foot pits for excavation, and one 30- by 50-foot pit, lined with 20 mm. PVC lining, for leaching, were planned. BLM completed an environmental assessment on September 15, 1986. On October 3, 1986, BLM approved the amended plan of operations, subject to various stipulations. In particular, the approval was made contingent upon the following provision:

> 4. The operator shall obtain all necessary federal, state and local permits prior to commencing surface-disturbing activities. Specifically, the operator will obtain the necessary approval for use of sodium hypochlorite from the Lahontan Regional Water Quality Control Board prior to the surface disturbance. Approval of this plan is contingent upon obtaining and abiding by such permits.

1/ Pursuant to section 204(b)(1) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1714(b)(1) (1982), the segregation effectuated by the filing of the proposal expired after 2 years. See B.J. Toohey, 88 IBLA 66, 93-97, 92 I.D. 317, 333-35 (1985). The proposed withdrawal was republished on Jan. 17, 1986. See 51 FR 2585.

By letter of the same date, BLM informed NWC of its approval of the amended plan of operations. In this letter, BLM noted that, consistent with its approval, any operations were contingent upon the approval of RWQCB, and that initial discussions between BLM and RWQCB had indicated that a bond would be required to cover any liability incurred by BLM for any discharge by the operator.

With reference to NWC's assertion that the claim had not been posted in compliance with California law, BLM noted Ross had denied NWC's allegations of untimely posting and that, absent verification by NWC of its charges, BLM would not be able to withhold approval of the plan of operations on that basis. On October 31, 1986, this appeal followed.

In its appeal, NWC argues that the mining claims are invalid, either because they were not posted in their present location on the date specified in the notices of location, because the claims were subsequently abandoned or because they were lost due to a failure to perform assessment work. NWC also asserts that BLM failed to follow its own regulations in approving the plan. It notes that sodium hypochlorite solvent was substituted for thiourea and alkali as the leaching agent without a formal amendment of the plan of operations. NWC alleges that, when BLM approved the plan of operations, it failed to assure adequate compliance with its environmental protection regulations found at 43 CFR Subpart 3809.

In his response, Ross has denied all of NWC's allegations. In particular, he insists that the claims were properly posted in 1983, and that he never effected an abandonment. He argues that BLM expended considerable time and energy to assure compliance, that it has procedures available to deal with future violations, if any, and that the plan of operations was submitted and changed in writing. He states that he substituted sodium hypochlorite for a more dangerous solvent and that BLM documented that change (Answer II at 24-25). He notes that he is subject to all permit requirements of the RWQCB and that a posted bond is one such requirement. He asserts that the Navy has drilled wells upstream, not downstream from the proposed operation (Answer II at 32). Finally, he offers numerous allegations of interference and intimidation and strongly questions the Navy's expressed concern for environmental dangers posed by toxic chemicals.

[1] As appellant has observed, BLM is obligated to prevent undue degradation of the public lands and protect against pollution of streams
and waters. 43 CFR 3809.0-3; see 3809.0-5(k). When a mining operation of the size contemplated herein is proposed, these goals are advanced by the requirement that a plan of operations be submitted which includes measures to prevent unnecessary or undue degradation in the course of operations, to reclaim the area, and to ensure that the standards found at 43 CFR 3809.1-3(d) are met. 43 CFR 3809.1-5(c)(5).

A review of the record supports BLM's approval of the plan of operations and convinces this Board that BLM has examined and carefully considered the plan of operations. BLM requested and received additional information from the mine operator. BLM conducted an environmental assessment which concluded that the proposed action, with the stipulations

applied thereto, would not result in a significant adverse impact to the environment.

As issued, BLM approval was expressly conditioned upon compliance with state and local permits including the approval of RWQCB. This is in accord with a 1985 memorandum of understanding (MOU) between the California Desert District, BLM, and the Lahontan RWQCB, which has overall responsibility for water quality protection in the area. See 43 CFR 3809.3-1(c). As Ross notes, the Lahontan RWQCB requires posting of bond to assure reclamation, detailed specifications of pit liners, leak detection and monitoring procedures and numerous other engineering specifications. BLM reasonably concluded that making approval of the mining plan of operation conditional upon compliance with RWQCB requirements addressed most of the Navy's engineering and environmental concerns. We can perceive no error in this determination.

[2] NWC also suggests that the decision should be reversed because the mining claims at issue are invalid. In support of its contention, appellant argues that the claims were not posted prior to the withdrawal, that they were abandoned, and that Ross and his co-locators failed to perform annual assessment work as required by 30 U.S.C. | 28 (1982). We agree with BLM that these assertions, absent the submission of proof thereof, would not justify it in refusing to approve the mining plan of operation.

With regard to the question of whether the claimants timely posted a notice of location, 2/ we note that Ross has affirmatively denied NWC's allegation that the claims were not monumented until after the application for withdrawal was published, arguing that the claims were indeed posted when they were located in 1983, but that the posts had been subsequently destroyed by other individuals. The record before the Board is clearly an inadequate basis on which to predicate a finding that the claims were not located until the land was segregated from mineral entry.

Insofar as the purported abandonment is concerned, only the filing by Byron Ross, made in his capacity as President of Lyra-Vega Mining Association on September 22, 1983, even purported to cover the two claims at issue herein. As BLM noted in a memorandum to the file, dated November 26, 1986, simultaneous with the purported "Notice of Intent to Abandon" the claims, Byron Ross also filed a notice of intention to hold the claims. In this memorandum, BLM noted that, since its records contained no indication as to who comprised the Lyra-Vega Mining Association, much less any indication of the authority of Byron Ross to act on behalf of all of the members, it determined that the abandonment notices would not be recognized as effective for recordation purposes.

2/ Inasmuch as the State of California does not require posting of placer claim boundaries where the boundaries conform to public land surveys (Cal. Pub. Res. Code | 2303 (West 1972)), as the claims in this case do, the only posting requirement applicable herein is the erection of a discovery monument. See 43 CFR 3831.1; United States v. Zwiefel, 11 IBLA 53, 80 I.D. 323 (1973).

In his answer, Bryant Ross asserts that Byron Ross had no authority to act on behalf of all of the members of the Lyra-Vega Mining Association. Even if he did, however, the record scarcely establishes that an abandonment of the claims occurred. As we noted in Oregon Portland Cement Co., 66 IBLA 204, 207 (1982), "'Abandonment' is a concept well known to mining law, but its basis is the traditional law of abandonment--relinquishment of possession together with the subjective intent to abandon." Inasmuch as the notice of intent to abandon was accompanied by a notice of intent to hold, it is arguable whether this filing can be said to be deserving of any probative weight on the existence of a subjective intent to abandon. In any event, appellant has provided no showing that, even assuming evidence of a subjective intent to abandon these two claims, such intent was accompanied by a relinquishment of possession.

Finally, appellant asserts that the claims are invalid because appellant failed to timely perform assessment work as required by 30 U.S.C. | 28 (1982). We note that there is some support for NWC's assertion in the review of the mining claim recordation files, maintained in the California State Office, BLM. Thus, while copies of proofs of labor for calendar years 1986 through 1988 were filed with BLM, only notices of intent to hold were filed for the years 1983 through 1985. While these submissions serve to establish compliance with the annual filing provisions of section 314(a) of FLPMA, 43 U.S.C. | 1744(a) (1982), they do not establish compliance with the assessment requirements of 30 U.S.C. | 28 (1982).

Under 30 U.S.C. | 28 (1982), appellant was required to perform annual assessment work in the value of $100 per claim, commencing upon September 1, 1983, and each year thereafter unless a deferment of the annual assessment was granted under the authority of 30 U.S.C. | 28b (1982). While Ross filed two petitions for deferment of the annual assessment work, one covering the 1983-84 assessment year and the other covering the 1984-85 assessment year, BLM denied these petitions. In Lyra-Vega II Mining Association, 91 IBLA 378 (1986), the decision of BLM on deferral of the 1983-1984 assessment work requirement was affirmed.

Ross does not really contravene the assertion that no assessment work was performed for the 1984 and 1985 assessment years. Thus, Ross argues that respondents "have performed all yearly required 'Notice of Intents,' and have also performed their recent 'Assessment Work'" (Answer II at 18, emphasis supplied). It can be taken as admitted, therefore, and consistent with the factual assertions accompanying the petitions for deferment of assessment work, that Ross failed to perform the annual work requirement for those 2 years. The question, then, is what consequence ensues because of this failure.

NWC is apparently of the view that the failure to perform assessment work, ipso facto, results in an invalidation of the claims. Such is not the case. Under the statutory scheme of the mining laws, the failure of a mining claimant to comply with the assessment requirements of 30 U.S.C. | 28 (1982), renders the claim subject to relocation by another. Additionally, where the land is withdrawn from subsequent mineral location and the original locator has failed to "substantially satisfy" the assessment work

requirements, this failure might work a forfeiture of the claim to the Government. See generally Oregon Portland Cement Co., supra; United States v. Haskins, 59 IBLA 1, 100-103, 88 I.D. 925, 975-76 (1981); United States v. Bohme, 48 IBLA 267, 87 I.D. 248 (1980). However, as we expressly noted in United States v. Energy Resources Technology Land, Inc., 74 IBLA 117, 121 (1983), the failure to perform assessment work for a single year does not constitute a failure to substantially satisfy the assessment work requirements. The record before the Board is simply inadequate for the purpose of determining whether or not Ross has failed to substantially satisfy the assessment work requirements. 3/ Thus, we must affirm the decision of BLM on this point.

In closing, we note that BLM has advised NWC that contest proceedings could be initiated on a cost-reimbursable basis "if a mineral examination revealed a lack of discovery on the claims" (Memorandum to File, dated Nov. 26, 1986). This is in accord with our decision in Southwest Resource Council, 96 IBLA 105, 122-24, 94 I.D. 56, 67 (1987). If, as a result of a mineral examination, the authorized officer has reason to believe that the subject mining claims are not supported by a discovery of a valuable mineral deposit, a contest would properly be authorized. United States v. Aiken Builders Products (On Reconsideration), 102 IBLA 70, 83 (1988) (concurring opinion). But, based on the information thus far provided by NWC, no adequate grounds have been shown such as would justify the initiation of a contest.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

James L. Burski
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

3/ While we have no difficulty concluding on the basis of the present record that Ross did not perform the required assessment work for 2 years, we are unable to definitively state that the assessment work requirement was met for the remaining years. The reason for this is that while the filing of proof of assessment work performed may be relevant as an indication that the assessment work was actually accomplished, it does not conclusively establish that the required labor or expenditures were made. See California Dolomite Co. v. Standridge, 275 P.2d 823, 825 (Cal. App. 1954); United States v. Haskins, supra at 102, 88 I.D. at 976. Obviously, however, a challenge to Ross' assertion that he did perform the required assessment work for the years subsequent to 1985 could only properly be raised in the context of a fact-finding hearing.